(9) (9)

Nos. 89-1452, 89-1453

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

MOBIL OIL EXPLORATION & PRODUCING SOUTHEAST, INC., *et al.*,
Petitioners,
v.
UNITED DISTRIBUTION COMPANIES, *et al.*,
Respondents.

FEDERAL ENERGY REGULATORY COMMISSION,
Petitioners,
v.
UNITED DISTRIBUTION COMPANIES, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

AMICUS BRIEF OF INTERSTATE OIL COMPACT COMMISSION IN No. 89-1452 IN SUPPORT OF PETITIONERS

W. TIMOTHY DOWD
Executive Director
RICHARD C. BYRD
General Counsel
INTERSTATE OIL COMPACT COMMISSION
P.O. Box 53127
Oklahoma, City, OK 73152
(405) 525-3556

ROBERT J. WOODY *
RICHARD G. MORGAN
BRIAN T. O'REILLY
R. DAVID BALLENGER
LANE & MITTENDORF
919 18th Street, N.W.
Suite 800
Washington, D.C. 20006
(202) 785-4949

PHILIP F. PATMAN
PATMAN & PATMAN
1704 NCNB Tower
515 Congress Avenue
Austin, Texas 78701
(512) 476-3529

* Counsel of Record

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

QUESTION PRESENTED

Whether, in the orders on review, the Federal Energy Regulatory Commission acted within its statutory authority and furthered the intent of Congress in the enactment of the Natural Gas Act, 15 U.S.C. § 717 *et seq.*, and the Natural Gas Policy Act of 1978, 15 U.S.C. § 3301 *et seq.*, wherein Congress has expressed strong support for regulatory actions which protect consumers by ensuring an adequate and reliable supply of natural gas at reasonable rates?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES Page

TABLE OF AUTHORITIES—Continued

Page

STATUTES AND REGULATIONS

MISCELLANEOUS

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

Nos. 89-1452, 89-1453

MOBIL OIL EXPLORATION & PRODUCING SOUTHEAST, INC., *et al.*,
Petitioners,
v.
UNITED DISTRIBUTION COMPANIES, *et al.*,
Respondents.

FEDERAL ENERGY REGULATORY COMMISSION,
Petitioners,
v.
UNITED DISTRIBUTION COMPANIES, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

---

AMICUS BRIEF OF INTERSTATE OIL COMPACT COMMISSION IN No. 89-1452 IN SUPPORT OF PETITIONERS

INTRODUCTION

The Interstate Oil Compact Commission submits this brief in support of the Federal Energy Regulatory Commission and the Mobil Oil Exploration and Producing Southeast, Inc. parties. For the following reasons, the majority decision of the Fifth Circuit in *Mobil Oil Exploration and Producing Southeast, Inc. v. Federal Energy Regulatory Commission*, 885 F.2d 209 (5th Cir.

1989), *cert. granted*, —— U.S. ——, 110 S.Ct. 2585 (1990), should be reversed.

INTEREST OF THE AMICUS CURIAE

The Interstate Compact to Conserve Oil and Gas (the "Compact") is an agreement among oil and gas producing states, originally six in number when first ratified in 1935. It was approved by the Congress in that year and has continued in force since August 27, 1935. Today twenty-nine states are members of the Compact.[1]

Article II of the Interstate Compact to Conserve Oil and Gas, as filed with the National Archives on September 22, 1971, provides:

> The purpose of this Compact is to conserve oil and gas by the prevention of physical waste thereof from any cause.

The Interstate Oil Compact Commission (the "IOCC"), the members of which are the Governors of the signatory states, is the administrative agency that was created by the Compact to carry out its purpose. The IOCC is a multistate governmental entity totally funded from tax revenues.

Historically, the responsibility for oil and gas conservation has vested in and has been exercised by the states, which are the custodians of natural resources within their borders. Indeed, the desirability of state regulation has been recognized by Congress, the Supreme Court of the United States, and numerous agencies and departments of the federal government. *See* Natural Gas Act of 1938 (the "NGA"), § 1(b), 15 U.S.C. § 717(b)

---

[1] The following states are members of the Compact: Alabama, Alaska, Arizona, Arkansas, California, Colorado, Illinois, Indiana, Kansas, Kentucky, Louisiana, Maryland, Michigan, Mississippi, Montana, Nebraska, Nevada, New Mexico, New York, North Dakota, Ohio, Oklahoma, Pennsylvania, South Dakota, Texas, Utah, Virginia, West Virginia, and Wyoming. There are also six associate members including Georgia, Idaho, North Carolina, Oregon, South Carolina, and Washington.

(providing that states retain jurisdiction over the production and gathering of natural gas); *Northwest Central Pipeline Corp. v. State Corporation Commission of Kansas*, —— U.S. ——, 109 S.Ct. 1262, 1274 (1989) (Section 1(b) of NGA sufficient to reserve power to states to act to prevent waste and product correlative rights); *F.P.C. v. Panhandle Eastern Pipe Line Co.*, 337 U.S. 498, 509-512 (1949) (legislative history of NGA shows Congress recognized that power to prevent waste is allocated to states). This responsibility reflects the direct, economic, social and vital interest of the states in the conservation of their natural resources.

Order Nos. 451 and 451-A (the "Orders") were promulgated in response to a proposal by the Secretary of Energy to revise old gas prices under the Natural Gas Policy Act of 1978 (the "NGPA"), 15 U.S.C. § 3301 *et seq. Ceiling Prices; Old Gas Pricing Structure*, 50 *Fed. Reg.* 48,540 (1985) (proposed November 25, 1985). A major reason for initiating the rulemaking was the concern that existing prices for natural gas under Sections 104(b)(3) and 106(c) of the NGPA were causing the premature abandonment of many old gas wells, resulting in the permanent loss of substantial old gas reserves. *Id.*, 50 *Fed. Reg.* at 48,540. The Secretary of Energy summarized the old gas pricing problem as follows:

> The existing price structure for old gas creates a barrier against the production of tens of trillions of cubic feet of old gas reserves, even though these reserves are easier and less expensive to produce than other gas sources. The artificially low prices imposed on old gas by the existing price structure prevents [sic] us from producing all our recoverable old gas supplies.

Id.

Because the Orders seek to prevent the premature permanent loss of substantial old gas reserves, the Orders

serve to bolster the conservation efforts of the IOCC and its member states. Those conservation efforts emphasize the prevention of waste through ceiling prices which extend the economic life of wells and permit additional work on older wells to assure maximum recovery of gas reserves.

Several of the individual IOCC member states are submitting a separate brief amici curiae wherein they urge grounds that are beyond the scope of the Compact as bases on which the Orders should be sustained. The IOCC as a whole has directed its Executive Director and General Counsel to submit this brief confined solely to consideration of the validity of the Orders as they pertain to the purpose for which the organization exists: conservation of the nation's oil and natural gas resources by the prevention of their ultimate physical waste. This brief is intended to assist the Court in its resolution of this case, which will have a direct effect on accomplishment of the Compact's stated purpose.

STATEMENT OF THE CASE

The Federal Energy Regulatory Commission (the "FERC" or "Commission") issued Order No. 451 on June 6, 1986. 51 *Fed. Reg.* 22,168 (1986) *reprinted at* III *FERC Statutes and Regulations* ¶ 30,701 (CCH 1986) (hereinafter citations to the Orders will refer to paragraphs and page numbers of the CCH Statutes and Regulations volumes). The FERC denied rehearing of Order No. 451 on December 15, 1986, and issued Order No. 451-A, which made certain revisions and clarifications to the original order. III *FERC Statutes and Regulations* ¶ 30,720.

Before describing the posture of the Order No. 451 litigation today, it is useful to address the state of the natural gas industry which led the DOE to suggest, and the FERC to adopt, the changes made by the Orders. In the early 1970's, it became apparent that the existing

regulatory structure was not working, as the United States was experiencing serious gas shortages. *See Transcontinental Gas Pipeline Corp. v. State Oil and Gas Board of Mississippi*, 474 U.S. 409, 420 (1986). In response to the imbalance between supply and demand the Congress enacted the NGPA, which was designed as a comprehensive statute to govern natural gas regulation. *Id.*, 474 U.S. at 420-21. The statute reflected a recognition that the old system was not working to balance supply and demand, and that a new approach was needed. *Id.*

The NGPA sets varying price ceilings for different categories of gas, depending upon when or how the gas is produced; higher ceiling prices are provided for production of "new", i.e., post-November 9, 1978 gas, or hard to produce gas and lower ceiling prices are provided for gas already in production at the time of the NGPA's passage, known as "old" gas. *See Public Service Commission of the State of New York v. Mid-Louisiana Gas Co.*, 463 U.S. 319, 331-336 (1981) (outlining features of the NGPA). Congress, however, recognized that NGPA ceiling prices might be set too low for "old" gas, and specifically authorized the Commission to raise these prices in accordance with NGA "just and reasonable" principles. *Id.*, 463 U.S. at 333.

The Commission in the Order No. 451 proceeding found that the existing price structure was skewing development and recovery efforts away from old gas, even though that gas is cheaper to produce than new gas. III *FERC Statutes and Regulations* ¶ 30,701 at 30,229. The Commission concluded that elimination of the existing price structure would increase recoverable old gas reserves by approximately 11 trillion cubic feet. *Id.*, ¶ 30,-701 at 30,234. Acting pursuant to its express authority under Sections 104(b)(2) and 106(c) of the NGPA, the FERC established a single ceiling price, or maximum lawful price (the "MLP") applicable to all vintages of old gas. The MLP was set at $2.57 per million Btus ("MMBtu"), which was the existing ceiling price for

the post-1974 gas vintage. *Id.*, ¶ 30,701 at 30,227. The FERC permitted producers to collect this price above the old ceiling *only* if the purchaser—either under its existing contract or in a new, post-Order No. 451 contract—*agreed* to pay a higher price. III *FERC Statutes and Regulations*, ¶ 30,720 at 30,403-30,430 (discussing and modifying Order No. 451 "good faith negotiation" procedure).

On September 15, 1989, a divided panel of the court of appeals vacated the Orders. It held that the Commission had exceeded its authority by collapsing the formerly separate vintage categories into one new ceiling price. *Mobil Oil Exploration, supra*, 885 F.2d at 218-221.

SUMMARY OF ARGUMENT

The majority decision of the Fifth Circuit should be reversed. The NGPA explicitly authorizes the Commission to set a ceiling price for old gas as long as that new ceiling price is just and reasonable under the NGA. The Commission has great latitude in its determination of just and reasonable rates as long as the price ceiling serves to assure adequate, reliable supplies of natural gas at reasonable prices. The Commission in its promulgation of the Orders was well within the bounds of its authority as defined by the NGPA,' and well within its purpose and mission as defined by the just and reasonable standard of the NGA.

The IOCC leaves for the parties the main issues of the comprehensive au'hority of the FERC to undertake the Order No. 451 program. As amicus, however, the IOCC emphasizes the issues of the conversation of natural resources and the prevention of waste. These concerns go hand-in-hand with the obligation of the Commission to assure an adequate and reliable supply of gas for the future. The Orders were issued, in part, because the old vintage price ceilings would result in the permanent loss of massive volumes of readily accessible natural gas. This is a fundamental reason why the Order No. 451

program is completely consistent with the NGA and NGPA, which explicitly share the goal of maximizing the utilization of natural resources. These issues, together with the FERC's clear authority to establish just and reasonable ceiling prices under the NGA and NGPA, provide an independent basis upon which the Orders should be affirmed.

ARGUMENT

I. THE NGPA PROVIDES THE COMMISSION WITH AUTHORITY TO RAISE OLD GAS CEILING PRICES TO A SINGLE CEILING PRICE WHICH IS JUST AND REASONABLE.

In NGPA Sections 104 and 106 Congress explicitly authorized the Commission to raise ceiling prices for dedicated gas sales "if such . . . price is . . . just and reasonable within the meaning of the Natural Gas Act". 15 U.S.C. §§ 3314(b)(2)(B) and 3316(c). The statute recognizes that the ceiling may be too low and authorizes the Commission to raise it whenever traditional NGA principles would dictate a higher price. *Public Service Commission of the State of New York*, *supra*, 463 U.S. at 333.

The majority of the Fifth Circuit concluded that Congress did not intend to give the FERC authority in Sections 104(b)(2) and 106(c) to set a *single* ceiling price for all old gas and that the Commission's actions amounted to impermissible *de facto* regulation. *Mobil Oil Exploration*, *supra*, 885 F.2d at 218-220. The majority did not reach the issue of whether the MLP set by the Commission was in fact just and reasonable under the NGA.

The plain language of Sections 104(b)(2) and 106(c) refutes the majority's conclusion regarding the lack of FERC authority to set a single MLP for all old gas and to collapse the vintage pricing structure within that

category. Those provisions allow the Commission by rule or order to set "*a* maximum lawful ceiling price" for any category of old gas. 15 U.S.C. §§ 3314(b)(2), 3316(c) (emphasis added). The *only* constraints which can be fairly read from the NGPA and its legislative history are that the new rate must be just and reasonable under the NGA standard and that it must be higher than the original ceiling set by the NGPA for that category of gas.

II. THE COMMISSION ENJOYS WIDE LATITUDE WITH RESPECT TO THE FACTORS CONSIDERED WHEN SETTING JUST AND REASONABLE RATES.

A. The Commission is Entitled to Considerable Deference in Formulating A Just and Reasonable Rate.

The majority decision below ignores the fundamental principle that the Commission is entitled to considerable latitude when attempting to achieve a legitimate regulatory goal. Indeed, the Commission must be free "to make the pragmatic adjustments which may be called for by particular circumstances." *Permian Basin Area Rate Cases*, 390 U.S. 747, 777 (1968) (quoting *F.P.C. v. Natural Gas Pipeline Co.*, 315 U.S. 575, 586 (1942)). The majority of the Fifth Circuit in this case has improperly second guessed the Commission.

The *only* constraint on the Commission's authority to increase the ceiling price for a category of old gas is the requirement that the resulting ceiling be just and reasonable. In determining whether the Commission has adopted a just and reasonable rate, the reviewing court must be guided not by the methodology employed by the Commission, i.e., replacement cost vs. historical costs,[3]

[3] The Commission patterned its replacement cost methodology on the approach used to determine the last nationwide rate of Opinion No. 770-A for post-1974 gas production. III *FERC Statutes and Regulations*, ¶ 30,701 at 30,226. Use of this methodology was affirmed in *American Public Gas Ass'n v. F.P.C.*, 567 F.2d 1016 (D.C. Cir. 1977), *cert. denied*, 435 U.S. 907 (1978). The Commission endeavored to accomplish the objective of achieving an adequate supply at reasonable rates by raising the vintage prices equal to the replacement costs of those reserves. III *FERC Statutes and Regulations* ¶ 30,701 at 30,222. Rates established using historical costs, on the other hand, reflect the costs actually incurred in developing the reserves in question generally without regard to the cost in today's dollars of replacing those reserves.

but, rather, by the ultimate result of the Commission's action. In other words, as this Court has affirmed, "[u]nder the statutory standard of 'just and reasonable' it is the result reached not the method employed which is controlling." *F.P.C. v. Hope Natural Gas Company*, 320 U.S. 591, 602 (1944). *See also*, *Permian Basin Area Rate Cases*, *supra*, 390 U.S. at 775. As long as the Commission's action is consistent with the controlling statute, as it is in this case, the reviewing court must accord deference to the agency's interpretation. *See K-Mart Corp. v. Cartier*, 486 U.S. 281, 291-92 (1988).

The Commission demonstrated to the Fifth Circuit that it had "given reasoned consideration" to each of the factors pertinent to its decision to use replacement cost as a basis for setting a higher price for old gas. Accordingly, because the Commission has the authority under the NGPA to set a single new just and reasonable rate for old gas, the Commission met its burden on review and the Fifth Circuit's decision should be reversed.

B. The Commission is Free When Formulating a Just and Reasonable Rate Under the NGA to Consider Non-Cost Based Factors.

As discussed, the Commission should be afforded wide latitude when deciding the methodology to employ in formulating a just and reasonable rate under the NGA. This is because the Commission must consider a myriad of factors besides price when setting a just and reason-

able rate. One such factor is the availability of long-term supplies to consumers. In this case, the Commission decided to use replacement cost pricing to set the MLP at a level that would "put some of the burden of replacing scarce gas supplies on the consumers of flowing gas," and to impose price rationality on the market in an effort to prevent the loss of significant volumes of old, low-cost gas. *Tenneco Oil Company v. FERC*, 571 F.2d 834, 840 (5th Cir. 1978), *cert. dismissed*, 439 U.S. 801 (1978), (*citing Mobil Oil Corp. v. F.P.C.*, 417 U.S. 283, 320 (1974)). *See also American Public Gas Ass'n, supra*, 567 F.2d at 1058. When exploring a particular methodology to establish a just and reasonable rate, the Commission undoubtedly has latitude to consider non-cost based factors, including the goal of increasing supply.[3] *See, e.g., Mobil Oil v. F.P.C., supra*, 417 U.S. at 320-321.

C. The Commission's Consideration of Non-Cost Factors, Particularly Increased Long-Term Supply, is Consistent with Congress' Intent As Reflected in the NGA and NGPA.

As this Court has noted, the Commission fulfills an essential purpose of the NGA when it sets rates to assure that there is "an adequate and reliable supply of gas at reasonable prices." *California v. Southland Royalty Company*, 436 U.S. 519, 523 (1978). Thus, the Commission was well within its regulatory authority under the NGA

[3] The amicus notes that in supporting the goal of maintaining an adequate and reliable supply into the future, the Commission did not sacrifice considerations of the Orders' ultimate effect on prices paid by consumers. The Commission believed that in the long-term the effect of the Orders would be to ensure lower prices. III *FERC Statutes and Regulations*, ¶ 30,701 at 30,236. In fact, the goal of setting realistic, market clearing prices, which encourage competition and increase utilization of natural gas reserves, fits very well with the ultimate goal of lowering the price paid by consumers.

when it considered the replacement cost of old gas and set out to avoid the possible permanent loss of substantial old gas reserves when it established a new MLP for old gas. Indeed, it was obligated to consider the effect of the new rate upon the long-term supply of old gas.

Congress' concern with adequate supplies of natural gas was not limited to the NGA, however. The assurance of adequate supplies was at the heart of the NGPA as well. Indeed, the NGPA was specifically adopted to remedy price disparities between the regulated interstate market and the unregulated intrastate market. Interstate ceiling prices were set at levels considerably below prices for gas in the unregulated intrastate market. This caused disparities characterized by severe supply shortages within the interstate market. In direct response to these shortages, Congress enacted the NGPA. *Transcontinental Gas Pipeline Corp., supra*, 474 U.S. at 420. In so doing, Congress affirmed a fundamental precept of its natural gas regulation: that price should be used to elicit supply. *See Colorado Interstate Gas Co. v. F.P.C.*, 324 U.S. 581, 612 (1945) (concurrence of Justice Jackson); *Placid Oil Company v. F.P.C.*, 483 F.2d 880, 901 (5th Cir. 1973), *aff'd sub nom. Mobil Oil Corp. v. F.P.C.*, 417 U.S. 283 (1974).

Accordingly, in considering the effect the new MLP for old gas would have on the continued long-term availability of those reserves, the Commission was responding directly to Congress' intent expressed in the NGPA that the statute ensure adequate and reliable supplies for consumers. The NGA and NGPA have vested the Commission with wide latitude to address the multitude of considerations which comprise the public interest, both short-term and long-term. The majority decision below has destroyed the Commission's ability to be creative in promoting the public interest under ever-changing market conditions, and therefore it should be reversed.

III. BY LAWFULLY ENCOURAGING INCREASED PRODUCTION OF OLD GAS, THE COMMISSION'S ORDERS FURTHER THE INTEREST OF THE AMICUS IN PREVENTING WASTE.

The natural gas industry is subject to interlocking regulation by both federal and state authorities. *Northwest Central Pipeline Corporation, supra*, 109 S.Ct. at 1271. Federal authorities are, on the one hand, charged with protecting the public interest, which interest includes ensuring adequate and reliable supplies of natural gas. State authorities, on the other hand, have long had the responsibility of protecting the public interest through the prevention of waste of natural resources and the protection of the correlative rights of mineral owners. *Id.*; *Northern Natural Gas Co. v. State Corporation Commission of Kansas*, 372 U.S. 84, 93 (1963); *Thompson v. Consolidated Gas Utilities Corp.*, 300 U.S. 55, 67 (1937); *Champlin Refining Co. v. Corporation Commission of Oklahoma*, 286 U.S. 210, 233-34 (1932).

By fulfilling its legal obligation under the NGA and the NGPA to protect the public interest in adequate and reliable supplies through the prevention of the loss of significant quantities of old, low-priced gas reserves, the Commission also furthered the conservation interests of the states in preventing waste. The Commission's Orders represent examples of the interlocking, and in some cases overlapping, responsibilities of federal and state agencies in the context of natural gas regulation. Absent the Orders, hundreds of old gas wells would be abandoned prematurely by producers because it would be uneconomic to produce their remaining reserves at the price levels available under the vintaging system. The failure to produce these reserves might then result in their permanent loss. The higher prices made possible by the Orders extend the economic limit of production, because a lower volume of gas produced per well will yield sufficient income to exceed a constant operating expense. Hence, there will be a greater volume of ultimate recov-

ery of gas from a well. The availability of higher prices under the Orders also permits an operator to perform reworking operations on a well that is approaching its economic limit. Reworking a well will increase the volume of gas flow and thereby extend its productive life. In many instances such reworking operations would not be economically attractive at the lower vintaged price levels.

Once a well is plugged and abandoned as having become uneconomic, it cannot readily be restored to production should prices later increase. The cost of reentering an abandoned well bore will ordinarily not be economically justified in view of the substantially depleted volume of physically producible gas still available for future recovery.

The Orders would prevent the premature and permanent loss of these old, low-cost, reserves by encouraging their continuing production. This is accomplished by raising the ceiling price of reserves to market clearing levels, meaning that the prices will be freed from the artifically low vintage rates and allowed to rise to the market level as long as the price does not exceed the MLP.

The permanent loss of substantial volumes of old gas reserves, which would undeniably occur absent reversal of the Fifth Circuit's majority decision, would represent waste of substantial proportions, at least 11 trillion cubic feet, according to the record. This represents more than 58 percent of the total United States natural gas consumption in 1989. April 1990 Monthly Energy Review (Energy Information Administration-Department of Energy 1990) at 58. Since the regulation of natural gas prices is clearly a field occupied by Congress, and then delegated to the Commission as Congress deems appropriate, only the Commission can prevent waste by the use of the change in the ceiling price contained in the Orders. Accordingly, the amicus strongly supports the

Commission's action under the Orders since it furthers the mutual interests of the states and the federal government through the use of a mechanism, i.e., price, only available to the federal government.

IV. THE CEILING RATE ESTABLISHED UNDER THE ORDERS SATISFIES THE JUST AND REASONABLE STANDARD OF THE NGA.

Rates are just and reasonable if they are within a "zone of reasonableness", meaning that a rate is neither so excessive as to exploit the consumer nor an unconstitutional confiscation of the property of the regulated entity. *Natural Gas Pipeline Co., supra.* The Commission is afforded considerable latitude in setting just and reasonable rates because the Commission's approach to the public interest must be multifaceted, encompassing many different concerns both existing and foreseeable. *Permian Basin Area Rate Cases, supra,* 390 U.S. at 792 (1968). In promulgating the Orders the Commission was responding to concerns which were both existing and foreseeable.

First, and most important to the IOCC, valuable supplies of inexpensive old gas, under the low-priced ceilings under NGPA Section 104(a), were being inadequately developed or prematurely abandoned. The Commission cited two studies by the Energy Information Administration showing that 1984 proven reserves had fallen to their lowest level since 1979. III *FERC Statutes and Regulations* ¶ 30,701 at 30,208-209. The Commission saw this as a dangerous development which, if not reversed, could result in the diminution of reserves to the point of creating shortages of natural gas. The Commission predicted that raising the ceiling price of these categories of gas (an option specifically provided by Congress) would allow more than 11 trillion cubic feet of additional old gas to be recovered. *Id.*, ¶ 30,701 at 30,229.

Second, the Commission saw that the old pricing system was keeping the price of old gas below the competitive market price. Different sellers (and purchasers) of natural gas had varying access to supplies of low-priced old gas. As a result, they were paying wildly varying prices for gas for reasons wholly unrelated to the value of the gas or the costs of replacing the gas. *Id.*, ¶ 30,701 at 30,204.

These market distortions, which would result in the massive waste of known natural gas reserves, were the reasons the Commission concluded that the old vintaging system should be collapsed and a new overall just and reasonable price formulated. In addition, the Commission was convinced that by allowing prices to be more market responsive, as was intended in the NGPA, *see Transcontinental Pipe Line, supra,* 474 U.S. at 421, overall lower prices would result. III *FERC Statutes and Regulations*, ¶ 30,701 at 30,236.

The Commission decided that the "replacement cost" ratemaking methodology would best serve these goals, as opposed to a historical cost approach. It saw that a competitive wellhead market was intended by Congress in its enactment of the NGPA, and that prices would be expected to recover the cost of providing new gas supplies into the future. *Id.*, ¶ 30,701 at 30,229. This methodology was different from that used to develop the pre-NGPA vintage prices, but the method had been used by the Commission before, and upheld as a methodology which resulted in rates within the zone of reasonableness. *Tenneco Oil Company, supra,* 571 F.2d at 840; *Shell Oil Company v. F.P.C.*, 520 F.2d 1061, 1079 (5th Cir. 1975), *cert. denied*, 426 U.S. 941 (1976).

The replacement cost methodology reflects one of the many concerns of the Commission which the NGA directs it to consider, namely the assurance of an adequate supply of natural gas in the future at a reasonable price. *See Tenneco, supra,* 571 F.2d at 840. Adequate supply is a perfectly permissible, and indeed, an obligatory fac-

tor, to be used in determining a just and reasonable rate. *Mobil Oil Corp., supra*, 417 U.S. at 320-321.

The goals the Commission used in formulating its new "just and reasonable" rate in Order No. 451 are legitimate and long-accepted factors used in setting just and reasonable rates within the industry. As stated, these goals are fully consistent in all particulars with the intent of the NGA and the NGPA.

These goals are in every way consistent with the broad goal of the NGA to assure adequate reliable supplies at reasonable prices. They are also consistent with the more recent goal of the NGPA to allow market forces to increase the efficiency of the natural gas industry generally, and natural gas markets specifically, and ultimately to lower consumer prices.

Because the Orders are entirely consistent with the purposes of the NGA and NGPA, evidence of Congressional intent which would prohibit the Commission's actions under the Orders should be very clear. *See Schultz v. Louisiana Trailer Sales*, 428 F.2d 61, 65 (5th Cir. 1970), *cert. denied*, 400 U.S. 902 (1970) (if a statute is susceptible to more than one construction, it must be given that which will best effect its purpose rather than defeat it). In fact, the plain language of the NGPA makes it clear that the Commission was authorized to effect a new single ceiling price for old gas.

CONCLUSION

For the foregoing reasons, the amicus urges the Court to reverse the decision of the Fifth Circuit.

Respectfully submitted,

W. TIMOTHY DOWD
Executive Director

RICHARD C. BYRD
General Counsel

INTERSTATE OIL
COMPACT COMMISSION
P.O. Box 53127
Oklahoma, City, OK 73152
(405) 525-3556

ROBERT J. WOODY *
RICHARD G. MORGAN
BRIAN T. O'REILLY
R. DAVID BALLENGER
LANE & MITTENDORF
919 18th Street, N.W.
Suite 800
Washington, D.C. 20006
(202) 785-4949

PHILIP F. PATMAN
PATMAN & PATMAN
1704 NCNB Tower
515 Congress Avenue
Austin, Texas 78701
(512) 476-3529

* Counsel of Record